In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-658

ROHM AND HAAS COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners' large chemical plant was discharging chemical waste products into the Houston Ship Channel. Since petitioners had not received a permit as required by Section 13 of the River and Harbor Act of 1899 (Refuse Act), 33 U.S.C. 407, the United States instituted this suit on July 19, 1971, alleging a violation of the Refuse Act and requesting injunctive relief. After a lengthy trial, the district court determined that petitioners' operations violated the Act, and it entered an order permanently enjoining petitioners from exceeding certain maximum effluent limitations and from barging certain waste materials to sea (Pet. App. B, pp. 39-44). The effluent limitations were based upon the expert testimony offered by both parties at trial (see Pet. App. B, pp. 40-41).

The court of appeals affirmed the district court's order setting maximum effluent limitations but remanded for modification of the injunction to limit its duration to the period preceding the issuance to petitioners of a permit (Pet. App. A, pp. 15-33, 36-38). The court also vacated the district court's order with respect to the barging of waste materials to sea and remanded for further consideration of that issue (Pet. App. A, pp. 33-36, 38).

1. Petitioners contend (Pet. 3-4) that abatement of this suit was required by Section 402(k) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1342(k), which provides that prior to December 31, 1974, discharges of effluents by a person who has applied for a permit under that provision shall not be in violation of the Refuse Act. However, as the court of appeals recognized (Pet. App. A, pp. 22-30), the 1972 Amendments contain a savings clause that specifically permits the continued prosecution of suits, such as this, that were commenced prior to the date of enactment of those Amendments.

The savings clause, Section 4(a) of the 1972 Amendments, 86 Stat. 896-897, "preserves two classes of pending actions brought by or against the Administrator or any other officer or employee of the United States: (1) those actions [including Refuse Act cases] brought by or against them in their official capacities; and (2) those actions brought by or against them in relation to the discharge of their duties under the old [Federal Water Pollution Control Act]" (Pet. App. A, p. 23). Petitioners' contention that the savings clause does not apply to suits brought under the Refuse Act has been uni-

formly rejected by the lower federal courts (see Pet. App. A, p. 29) and is contrary to the legislative history (see Pet. App. A, pp. 23-29).[1]

2. Petitioners further argue (Pet. 5-7) that the district court, in setting maximum effluent limitations, should have explicitly taken into consideration the factors required to be followed by the Environmental Protection Agency in setting guidelines pursuant to Sections 301, 304, and 307 of the 1972 Amendments. However, as petitioners apparently recognize, there is no statutory requirement that those factors be considered explicitly in framing equitable relief under the Refuse Act. Nor is there any showing here that the district court abused its discretion in setting the effluent limitations. Since "[d]ischarges in violation of the Refuse Act may be completely halted by injunction" (Pet. App. A, p. 31), it was not unreasonable for the court to impose less of a restriction upon petitioners' discharges.[2]

3. Petitioners' final contention (Pet. 8-13) is that this suit has resulted in discriminatory enforcement of water pollution standards. According to petitioners, few operators of chemical plants were sued under the Refuse Act prior to enactment of the 1972 Amendments and, as a consequence, the district court's injunction adversely affected petitioners' competitive position. This contention was correctly rejected by the court of appeals (Pet. App. A, pp. 37-38):

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[1]Moreover, the issue now is of little continuing importance because the statutory suspension against the filing of new suits under the Refuse Act terminated on December 31, 1974. See Section 402(k) of the 1972 Amendments.

[2]Petitioners' related contention (Pet. 7-8) that the district court should have abstained from decision pending the grant or denial by the Environmental Protection Agency of petitioners' requested permit, is contrary to the evident intent of the 1972 Amendments' savings clause. See pp. 2-3, *supra*. No statute required the district court to abstain from decision, nor was it an abuse of discretion for the court to refuse to do so.

> [Petitioners argue,] however, that if the FWPCAA standards are not applied in establishing effluent limitations [they] will be denied equal protection of the laws, "or perhaps more accurately an equal right to violate the law." * * * The number of uses prosecuted by the Justice Department under the Refuse Act negates any contention that discrimination in the form of a vendetta is being practiced against [petitioners] alone. The difference between the standards applied to defendants in Refuse Act suits brought before the enforcement of FWPCAA and that applied to other polluters is the result of the savings clause. Whenever legislation changes a legal standard but saves pending actions, there is apt to be differing treatment of those otherwise similarly situated. The difference in treatment does not rise to the constitutional level of a denial of equal protection. In any event, the effect of the District Court's decree will not survive the issuance of a permit, which will depend upon the application of FWPCAA standards to [petitioners] equally with all other applicants.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.